

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

---

No. 24-3445

No. 25-1053

---

DRAKE UNIVERSITY,  
*Appellee-Cross Appellant,*

v.

DES MOINES AREA COMMUNITY COLLEGE FOUNDATION and  
DES MOINES AREA COMMUNITY COLLEGE,

*Appellants-Cross Appellee*

---

APPEAL FROM THE U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF IOWA

Case No. 4:24-cv-227  
HON. STEPHANIE M. ROSE

---

**MOTION TO SUPPLEMENT RECORD**

---

COMES NOW Appellee/Cross-Appellant Drake University (“Drake”) and for its Motion to Supplement the Record, states as follows:

1. The Parties to this appeal each rely, in part, on *Iowa Paint Mfg. Co. v. Hirshfield’s Paint Mfg., Inc.*, 296 F.Supp.2d 983 (S.D. Iowa 2003).

2. *Iowa Paint* concerns a motion for preliminary injunction in which the district court assessed whether use of the mark PRO-WALL was likely to infringe rights asserted in PROWALL. *Id.*

3. The district court conducted a trademark infringement analysis under *SquirtCo. v. Seven-Up*, 628 F.2d 1086 (8th Cir. 1980) and a preliminary injunction analysis under *Dataphas Sys, Inc. v. C L Sys., Inc.*, 640 F.2d 109 (8th Cir. 1981). *Iowa Paint*, 296 F.Supp.2d, at 988–989.

4. The parties’ respective paint can labels carried “house marks” in addition to PROWALL or PRO-WALL; accordingly, the district court’s opinion evaluated the effect of house marks on an infringement analysis. *Id.*, at 994–995.

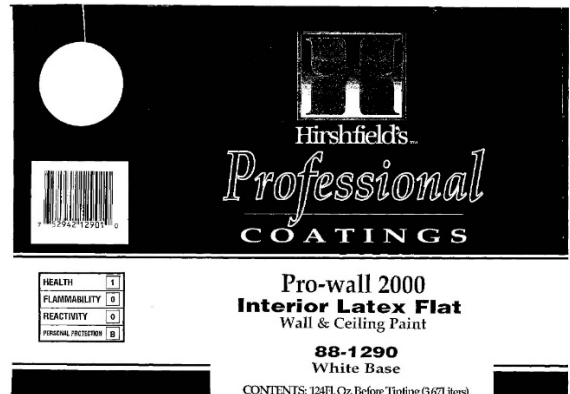
5. The labels are not reproduced in the decision. This omission limits the probative value of the decision as it is unclear how consumers encountered the marks.

6. The labels do appear in the plaintiff’s preliminary injunction brief, which is available through legal research tools and PACER. Case No. 4:03-cv-40451, Document 6 (filed September 11, 2003) (S.D. Iowa).

7. The following images taken from Exhibits 2 and 4 of the *Iowa Paint* plaintiff's brief provide full context for the analysis undertaken in the *Iowa Paint* decision:



*Exhibit 1*



*Exhibit 2*

8. Drake is not seeking to include these images for any improper purpose.

**WHEREFORE**, Drake respectfully requests that the record on appeal be supplemented with Exhibits 1 and 2 attached hereto.

Respectfully submitted,

Dated: March 13, 2025

**ZARLEYCONLEY PLC**

By: /s/John D. Gilbertson  
John D. Gilbertson, AT0014515  
Joshua J. Conley, AT0011828  
580 Market Street, Suite 101  
West Des Moines, IA 50266  
Telephone: (515) 558-0200  
Facsimile: (515) 558-7790  
jconley@zarleyconley.com  
**ATTORNEYS FOR**  
**APPELLEE/CROSS-APPELLANT**

**CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION,  
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

X This document contains 275 words; **or**

     This brief uses a monospaced typeface and contains        lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

X This document has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman font; **or**

     This document has been prepared in a monospaced typeface using        with        characters per inch in      style.

3. The undersigned further certifies that the electronic version of this brief has been scanned for viruses and is virus-free.

Dated: March 13, 2025

/s/John D. Gilbertson

John D. Gilbertson

Attorney for Appellee/Cross-Appellant

## **CERTIFICATE OF SERVICE**

I hereby certify that on March 13, 2025, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/John D. Gilbertson